



Heuser, B. (2019) Ordinances and Articles of War before the Lieber Code, 866-1863: the long pre-history of international humanitarian law. In: Gill, T. D., Geiß, R., Krieger, H. and Paulussen, C. (eds.) Yearbook of International Humanitarian Law, Volume 21. T.M.C Asser Press, pp. 139-164. ISBN 9789462653429.

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Deposited on: 29 April 2019

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Chapter X

Ordinances and Articles of War before the Lieber Code, 866-1863: the long pre-history of International Humanitarian Law

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Contents

X.1. Introduction

X.2. Antecedents and Background to Ordinances and Articles of War

X.2.1. The Origins

X.2.2. The First Ordinances

X.2.3. Ordinances with international points of reference: the Sixteenth and Seventeenth Centuries

X.2.4. Between army regulations and laws of war : the Eighteenth and Nineteenth Centuries

X.3. Were the ordinances effective ?

X.3.1. The Anglo-Scottish Wars and the Hundred Years' War

X.3.2. The Anglo-Spanish War (1585-1604)

X.3.3. The English Civil War (1642-1651)

X.3.4. Other evidence of application

X.4. Ius publicum europaeum?

X.5. Conclusion

Abstract ABSTRACT TEXT

Key textbooks and reference works on International Humanitarian Law treat it as though it had not existed before the American Lieber Code, a set of ordinances for conduct in war, was adopted unilaterally in 1863. The Lieber Code, however, was only one in a series of such ordinances which can be traced back in Europe to the 9th century. These were indeed established norms and traditions, as the application of the four criteria listed by the Statute of the International Court of Justice show: they were applied by (here: military) tribunals and

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other law courts; they were treated as customary law (defined there as “international custom, as evidence of a general practice accepted as law”); they were seen as “general principles of law recognized by civilized nations”; and finally, they were discussed in “judicial decisions and [in] the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” International Humanitarian Law thus has its roots in Europe, and has a far longer pedigree than is generally assumed.

Keywords

Ordinances, *Ius in bello*, Treatment of civilians, Military tribunals, Military discipline, Middle Ages, Early Modern History

X.1. Introduction

Classical academic works on the laws on the conduct of war (*ius in bello*) suggest that they did not exist or had no importance before the mid-Nineteenth Century. Burrus Carnahan of the Law faculty of the George Washington University in Washington DC wrote, “[t]he roots of the modern law of war lie in the 1860s.”¹ The eminent Oxford specialist on war and international relations, Adam Roberts, in his key work of reference on the laws of war edited with Richard Guelff skips the early centuries of their development by writing:

The most famous *early* [sic!] example of a national manual outlining the laws of war for the use of armed forces, and *one of the first attempts* [sic!] to codify the laws of land warfare, was the 1863 ‘Instructions for the Government of Armies of the United States in the Field’ prepared by Dr Francis Lieber of Columbia University. This [...] ‘Lieber Code’ [...] became the model for many other national manuals [...].²

And this is not just the perception in the Anglosphere. The late Mario Bettati, one of the leading experts on the laws of war in France, wrote about any pre-Nineteenth Century literature on war (apparently with the assumption that this consisted exclusively of the works of great jurists like Grotius and Vattel or philosophers like Rousseau), “[t]he theoretical dimension of [their] theses did not predispose them to form norms that are directly applicable to military operations. They only form an ethical basis [...]” He, too, then proceeds to cite the Lieber Code, along with the

¹ Carnahan 1998, p 213.

² Roberts and Guelff 2000, p 12,

initiative of Henri Dunant which led to the creation of the International Committee of the Red Cross (ICRC).³ Bettati's colleague at the University of Lyon, David Cumin, another author of key reference works on international law, says much the same: while he says that "the *ius in bello* has a very old and multi-civilisational history", he then proceeds to list only the creation of the ICRC, the First Geneva Convention of 1864, the Declaration of St Petersburg of 1868, the Brussels Conference of 1874, the Oxford Manual of 1880 and "the first codification" with the Hague Conferences of 1899 and 1907.⁴

In his study of armed conflict that has gone through several impressions and was awarded numerous prizes, the eminent Belgian professor of Law Eric David stated even more bluntly: "If war crimes are grave violations of rules applying to international armed conflict, the origin of this charge in international penal law goes back to the Code of Francis Lieber, promulgated by the American Government in the Civil War of 1861-1865."⁵

The Lieber Code is uncontestably a very important document in many respects. Its influence on the various conferences of the second half of the Nineteenth Century was considerable, and it is outstanding in that it articulates the reasons underlying the rules of engagement that it formulates. These applied, unilaterally, to the soldiers fighting for the Union.

Nevertheless, it was far from being the first code or collection of articles of war on land,⁶ what is now subsumed under "rules of engagement". Much to the contrary, it is but one very late example of a very long tradition of the unilateral adoptions of such articles of war or rules of conduct *in bello*, in what are often also called articles or ordinances of war, as they were issued by order of the prince or the supreme general leading a military campaign.

There is as yet no general history of the ordinances and articles of war in the Western world. Some specific studies have been devoted to specific sets of such documents, as we shall see, and they have been mentioned here and there in the great works on the history of war. In 1901

³ Bettati 2016, p 16 f.

⁴ Cumin 2015, p 493.

⁵ David 2012, p 769.

⁶ As this article covers a millennium of European history, it seems legitimate to confine it to ordinances concerning land warfare. The norms governing naval warfare were distinct and complex, until 1856 revolving largely around captured cargo, whether this was of military or purely commercial value. Armies also were sources of booty in the Early Middle Ages, but by the time period considered here much less so than towns and cities. See Halsall 2003.

the Austrian historian Wilhem Erben was still under the mistaken impression that the Ordinance proclaimed by Emperor Maximilian I at the beginning of the Sixteenth Century was the first ever of the Holy Roman Empire.⁷ Other authors writing more recently attribute certain rules, such as the sparing of noble ladies, to a “code of chivalry”.⁸ In short, what is lacking is a general account and analysis of the origins and evolution of these ordinances of war, a gap which this article seeks to fill as a first sketch.

Moreover, some of the quotations above imply that there were no norms for the conduct of war before the second half of the Nineteenth Century. Admittedly, there were no multilateral treaties signed by both or all parties to a possible future conflict. But there are other criteria to establish that norms and traditions exist, as listed by the Statute of the International Court of Justice: their application by (here: military) tribunals and other law courts; their existence as customary law (defined there as “international custom, as evidence of a general practice accepted as law”); that they are seen as “general principles of law recognized by civilized nations”; and finally, that we can find their discussions in “judicial decisions and [in] the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”⁹

As the evidence produced in this article demonstrates, ordinances of war are much more than unilateral declarations: they fulfil the conditions of having been applied by military tribunals, but also of constituting, at the very latest since the Sixteenth Century, international norms established with reference to ordinances of other countries and to the teachings of internationally respected lawyers. To sum up, the laws for the conduct of war go back a thousand years before the Lieber Code which is merely one example, and not even the latest one, of unilaterally adopted and proclaimed rules. More still, the format of such ordinances, and the articles of war they contain, follow a pattern that was constituted in the Ninth Century and had seen little fundamental change since; the Lieber Code itself merely follows this format.

X.2. Antecedents and Background to Ordinances and Articles of War

⁷ Erben 1901.

⁸ Blank and Noone 2013, pp 277 f; Chinkin and Kaldor 2017, p 232.

⁹ Statute of the International Court of Justice, 33 UNTS 993, entered into force 24 October 1945, Article 38(1).

Restrictions on how war is to be fought go back to Ancient History. Greeks were expected to treat fellow-Greeks better than the Barbarians. While the Greeks did not always live up to these expectations, since the wars of Ancient Greece, we find a widely-shared notion that one should limit the harm that might be done to those of one's own civilisation – centuries later translated into 'Christendom' – which did not apply to wars against outsiders. This article will focus exclusively on rules of war applicable to the former (or what is called, intra-civilisational war).¹⁰

Greeks and pagan Romans were careful not to offend the gods and their servants on earth, and this concern continued with the advent of Christianity. Christian emperors took the Church and clergy under their protection, and we see Christianised rulers of tribes established within the confines of what had been the Roman Empire adopt a similar attitude.¹¹ Perhaps they thought that, like pagan gods, God and his saints would take revenge if their sanctuaries were not respected.

Pagan Antiquity had not been strong on compassion, which is arguably a trait that made Christianity so attractive. With arguments of compassion, in Ireland the abbot Adomnán in the Seventh Century introduced a set of laws attempting to limit the violence against members of the clergy, women, and young people (probably referring to children).¹² The context seems to have been clan warfare, in which women participated.¹³ This codex, known as the Law of Innocents, seems to have had little, if any, influence on the rest of Europe. Yet as we shall see, rulers on the Continent ordered similar protection of civilians in war at the latest around 800 AD.¹⁴

At the latest from the Tenth Century, we find a concerted campaign of a number of Church leaders in the South-East of France to protect ecclesiastical property, clergy and the poor from molestation in the context of growing numbers of wars between lesser noblemen within kingdoms, yet further incursions by pagan tribes and warfare between Christian princes. A new movement, the *Pax Dei* movement, aiming to impose restraints on war took off with the Church

¹⁰ For a survey of how this distinction evolved and what norms were or were not applied over time, see Kortüm 2006.

¹¹ Gregory of Tours 594, Book II, paras 104, 105.

¹² Cox 2018, p 109 f.

¹³ Ni Dhonnchadha 2001.

¹⁴ See below, Charlemagne's orders.

Councils of le Puy and Charroux in 975 and 989 respectively which declared anathema on anybody pillaging churches, troubling members of the clergy or robbing the poor.¹⁵ The idea of a truce of God or *Treuga Dei* was added, outlawing warfare (mainly violent clashes among noblemen and their retinue *within* polities) on particular days of the week and during holy periods such as Lent. The movement spread throughout France but also the Iberian Peninsula¹⁶ and became very influential in the Eleventh Century. Knights were encouraged to swear, as we know from this text drafted by the Bishop of Beauvais in 1024:

I shall not break into a church in any way. [...] I shall not attack a cleric or a monk if they are unarmed, nor those who walk with them without lance or shield. I shall not take their horse. [...] I shall not take his ox, cow, pig, sheep, lamb, goat, donkey, the wood it carries, the mare and her [...] foal. I shall not seize the male peasant nor the female peasant, the sergeant or the merchants; I shall not take their money, I shall not make them pay ransom, I shall not ruin them. [...] I shall not burn or pull down houses unless I find within them a knight who is my enemy, or a robber. I shall not attack the merchant nor the pilgrim and I shall not rob them, unless they have committed a crime [...]. I shall not attack noblewomen nor those who are with them, in the absence of their husbands. [...] From the beginning of Lent until Easter, I shall not attack the knight who is unarmed and I shall not take from him the baggage he has with him [...].¹⁷

That these renunciations had to be spelled out makes the knight seem much like a repentant highwayman. Yet this list of abstentions resembles articles of war. They seem to refer only to behaviour in the lands of the knight's feudal lord, which was also true at first for medieval articles of war, as we shall see.

The *Pax Dei* and *Treuga Dei* movement reached a high point when Pope Urban II in 1095 called a crusade to free the Christians in the East from their Turkish oppressors, and simultaneously declared a period of internal peace within Christendom while this war, later to be referred to as the First Crusade, lasted. Such a *Peace of God* would henceforth always accompany crusades. But from this point onwards, as Rolf Grosse has shown, individual kings and dukes seized hold of this initiative to use it for the purpose of creating their own monopoly of the use of force within their own lands.¹⁸

¹⁵ Councils of le Puy and Charroux 975/989.

¹⁶ Hoffmann 1964. Wohlhaupter 1933.

¹⁷ Quoted in Hanne 2012, document 48, p 68 f; see also document 49, p 69 f.

¹⁸ Grosse 2002. Gergen 2004.

In the German-speaking world, this imposition of peace within polities is often called *Landfrieden*, peace of the land, by German historians, retroprojecting a term that only came into use at turn from the fifteenth and the sixteenth centuries (in documents the terms used are simply *pax* or *constitutio de pace tenenda*). The enforcement of peace at home by secular authorities constitutes a gradual shift away from an ecclesiastic law towards secular law, illustrating the transformation of medieval monarchies into early modern States.¹⁹ In the Holy Roman Empire, we find a prominent example in the *Constitutio de Pace tenenda* of Emperor Frederick I Barbarossa of 1152.²⁰ We also find a sort of *Landfrieden* described in the Mirror of Saxons, a collection of laws and customs, compiled and published by Eike von Repgow, dating from 1220-1232. Repgow already mentioned an ‘ancient peace of the land’ implying that this was seen as long-established customary law already in his time.²¹ From the Thirteenth Century, the concept can be found in a series of treaties between towns or lords before adopted by the Empire as lasting norm in 1495.²²

In England, royal attempts to banish the feuds between barons and to impose a “King’s Peace” has Anglo-Saxon roots.²³ England suffered wars of succession in 1066 and then in the Twelfth Century (the “Anarchy”, and then the rebellion by Henry II’s sons against him), revolts of the barons in the Thirteenth Century, was dragged into a war over the French succession by its ambitious dynasty in the fourteenth and early fifth Fifteenth Century (the Hundred Years’ War) before being torn apart again by domestic wars of succession (the Wars of the Roses). Establishing the ‘King’s Peace’ was thus both, particularly desirable and difficult to achieve. The King’s Peace in England and God’s Peace and God’s Truce in France thus aimed to limit, on the one hand, the right to resort to war (the *ius ad bellum*) on the part of the lesser and higher nobility (at least during certain times of the year), or to do away with it completely in times of external war (especially, during the crusades). On the other hand, they also aimed to limit actions by soldiers in wars (*ius in bello*), so that above all the Church and its properties, the clergy, but also women, peasants and merchants would be protected. What was required on top of this was the application of these principles to the actual conduct of war, by means of

¹⁹ Wohlhaupter 1933, p 357. Hoffmann 1964.

²⁰ *Monumenta Germaniae Historica* 1893, pp 194-198.

²¹ Gergen 2004, p 261. Admittedly, Clovis’ behaviour was exceptionally pious as Gregory’s account of the campaigns of Clovis’ contemporaries and successors illustrates.

²² Kleinschmidt 2013, p 103.

²³ O’Brien 2018.

ordinances issued by princes or their chief military commanders to those who were to respect these principles: the soldiers themselves.

About a hundred such ordinances can be found, probably more, which translate these principles into concrete rules (“articles”) relating to the conduct of war. Not all of them are called “ordinances” or “articles of war”. But they can be identified as such by their increasingly standardised format and content.

Let us begin by looking at the judicial pre-history of such ordinances of war.

X.2.1. The Origins

We know of rules and limitations on war in Ancient Greece and Ancient Rome, and the God of Hosts of the Israelites tended to give them (generally pretty inhumane) instructions on what they should do in war.²⁴ When the Roman Empire embraced Christianity, the *Codex Theodosianus*, an early Fifth-Century law code, outlawed pillaging ecclesiastical property. Barely a century later, we see that this Christian-Roman norm survived in the West despite the fall of Rome itself. The Frankish king Clovis, marching past Tours with his host, “because of his respect for Saint Martin, [...] ordered that no-one should take anything in those lands [belonging to Tours and the church of St Martin] other than vegetables and water.” Then when he approached the church dedicated to Saint Hilary at Poitiers, “Clovis forbade his entire army to pillage any person or goods at that place or on the way”.²⁵ Three hundred years later, in a similar context in 806 (armed forces marching through Frankish lands towards an engagement with an enemy, here in Eastern Saxony), Charles the Great wrote to Fulrad, Abbot of St Quentin, concerning the soldiers Fulrad was supposed to send him:

We ask of you that you should have in your wagons victuals for three months, counted from their departure from [their meeting point at] Strassfurt, and weapons and clothes for six months. We also command that you ensure that you get to the aforementioned place peacefully, travelling whichever way through the kingdom, so that you do not have the audacity to touch anything other than grass, wood and water; that each of your men should be with his wagons and horses at all times until

²⁴ Cox 2018, pp 90-110. O’Driscoll 2015.

²⁵ Gregory of Tours 594, Book II, paras 104, 105.

reaching the aforementioned place, so that the absence of the masters of the areas crossed should not serve as a pretext to do wrong.²⁶

Fifty years later, in 857, the capitularies issued under Emperor Charles the Bald did not limit themselves, as in the case of Clovis, to prohibit transgressions against the possessions of the clergy, but also stated that widows, orphans and the poor should be protected. Thieves, robbers and ravishers of virgins and widows were to be prosecuted unless the ravishers promised to marry the women concerned (nothing was said of married women who would fall victim to such acts). The aim here, as in the earlier documents, is the protection of the population of the empire itself against misdeeds committed by its soldiers, whether in times of war or peace.²⁷

X.2.2. The First Ordinances

The first document with some of the contents that would characterise most subsequent military ordinances containing articles of war, and with the layout that would become the standard until our own times (a list of rules in the format of Carolingian capitularies that the lay or ecclesiastic princes imposed on their armies and corresponding punishments for disobedience) dates from just a few years later. This is the *Constitutio Expeditionis Beneventana*, promulgated in 866 by Emperor Louis II, almost exactly a millennium before the Lieber Code. This ordinance was addressed to the forces whom the Emperor sought to rally against the Moslem invaders of South-Eastern Italy. The document's format is similar to the capitularies of Charles the Bald. It contains twelve articles, beginning with the princes' obligation to raise troops for this expedition, conditional upon earnings – to qualify for military service a peasant had to have a minimum of wealth to be able to leave the running of his farm to others in his absence. The ordinance then goes on to decree that anybody who would pillage a church, commit adultery (what is probably meant is rape) or cause a fire would risk the death sentence (“vita incurret periculum”, Article 8). The theft of an ox, of clothing and arms would also be severely punished.²⁸ Not only is this the earliest set of articles I have found in this format, but it also exemplifies the first of two, sometimes distinct, mostly overlapping sorts of ordinances. As this one is particularly concerned with reducing the harm done to civilians, we shall call it the population-centric type.

²⁶ Translation in Bonnet and Descatoire 2001, p 115.

²⁷ “Allocutio missi cuiusdam Divionensis” [Address to the emissaries from Divion], *Monumenta Germaniae Historica* 1890, No. 267, pp 291-292.

²⁸ *Monumenta Germaniae Historica* 1897, pp 94-96.

Two centuries later, another ordinance was issued, which would achieve considerable fame and serve as a model for subsequent regulations.²⁹ This was the ordinance of 1158 issued by Emperor Frederic I Barbarossa when he set out to fight Italian cities that under the leadership of Milan had risen against his rule. Comprising 25 articles, it was mainly of a second type, focusing on the discipline of the army itself, or what one historian has called “measures taken to ensure peace within the army itself”, a preoccupation of commanders through the ages.³⁰ In it the Emperor spelled out interdictions and punishments for disobedience: soldiers were not to fight among themselves nor sound the alarm without reason, they were not to attack unarmed people, especially not merchants (who now supplied the armies where earlier soldiers had had to bring most of their victuals along). Soldiers were not to have women with them in the camp, they were not to steal, especially not from churches, or sack or burn down farms. This is a rare example of an ordinance that does not stress on the immunity of clergy and peasants – probably not an accidental omission as the Emperor was at the time quarrelling with the pope about who held supreme power in the Holy Roman Empire.³¹

In the following century, we find ordinances that are more fully of this second type, exclusively concerned with regulating the relationship between professional (i.e. paid³²) soldiers and their employer, and the discipline of the army. These include the *Codicetto militare per la spedizione di Montaperti* which was drawn up on the Florentine side on the eve of the battle between Florence and Siena in 1259. The *Codicetto* or “small codex” echoes Frederick Barbarossa’s explicit protection of merchants.³³ This is the first in a long list of contracts between paid soldiers, represented usually by their captain who was also responsible for their recruitment, and the polity that employed them. We find further examples of such a contract in the *Codice militare per le Masnade stipendiarie di Pisa* [Military codex for paid mercenaries of Pisa] of 1348,³⁴ and the ordinance of the Republic of Florence (*Codice degli stipendarii*) of 1369.³⁵ In the German-speaking lands these contracts would later be referred to as *Artikelsbriefe*, letters of articles listing the obligations of soldiers. They almost exclusively related to issues of

²⁹ Fourquevaux 1548, p 96.

³⁰ Göricht 2001, p 266 f.

³¹ Monumenta Germaniae Historica 1979, Doc 222, pp 4 f.

³² Often called *stipendarii* or mercenaries, but this word did not yet have the negative connotation it acquired in the nineteenth century.

³³ Ricotti 1844, pp 349-358.

³⁴ Ricotti 1845, pp 293-308.

³⁵ Ibid., pp 315-329.

discipline, command and obedience. Such ordinances, besides listing forbidden behaviour also listed the types of punishment to be imposed for each misdeed (which might range from desertion to playing dice), and prescribed how to divide up the spoils of war. Yet from time to time, one would find even among the 20-50 articles a handful prohibiting theft from churches, or any violent acts against clergy or people we would call civilians.

Meanwhile, kings and emperors continued to show concern for the wellbeing of their own populations when their armies were marching through their lands. In the Fourteenth Century, we see the spread of population-centric ordinances from the Holy Roman Empire to other European polities, and we also see that they increasingly addressed the soldiers themselves. While the codices of Florence and Pisa of the thirteenth and fourteenth centuries were still written in Latin, we now find ordinances written in vernacular languages. The Ordinance of King Philip VI of France, published on 23 March 1338 in view of a planned campaign by the Duke of Normandy to conquer England, was written in French.³⁶ Thus captains could be instructed to read out the ordinances aloud to the soldiers before each campaign.³⁷ From 1492, English ordinances were printed and captains were held responsible for their observance by their soldiers.³⁸

Up to the fifth Fifteenth Century, it seems that the articles only applied to the particular military campaign for which they were proclaimed. Thus it was necessary to repeat them for each campaign, which sometimes meant they were proclaimed several times during one war (e.g. for each siege of a town individually).³⁹ Moreover, they were often tailored to the requirements of a particular siege, where they would be used to put pressure on the town to surrender in exchange of clement and disciplined behaviour by the besieging forces (towns that resisted and were taken by force were usually sacked and often burned, their populations raped and maltreated, sometimes killed in large numbers, a custom going back to Antiquity). Or else they would apply only to the lands under the rule of the prince who had issued the ordinances.⁴⁰ An exception to these two categories are the ordinances promulgated by Henry V of England, the victor of Agincourt, probably in 1419 or 1421, probably at the town of Mantes-la-Jolie. These ordinances were intended to protect the inhabitants of Normandy against the ravages of war,

³⁶ Twiss 1871, Volume I, Annex, pp 420-423.

³⁷ Tallett 2006, p 22.

³⁸ *Ibid.*, pp 375, 380 f.

³⁹ Cazelles 1960, pp 530-548.

⁴⁰ Cox 2013, pp 1403-1405. Martinez 2017, pp 361-385.

as he hoped to be able to hold on to Normandy and to integrate them into his own dynastic lands.⁴¹

Thus, at the very end of the Middle Ages, we can trace a shift in thinking about the treatment of civilians in war, which very slowly, and in the context of the complex loyalties in France, began to be applied also to the civilians in areas under the adversary's regime. Henry V's Mantes Ordinance did not apply to French civilians generally, only to those in the contested areas. But progressively, rules that the Church had sought to spread throughout Christendom for the previous five centuries began to find more general acceptance, namely that clergy, the old, children, women, and indeed merchants *on all sides* should be spared.⁴² Towards the end of the Fourteenth Century Honoré Bovet in his *Tree of Battles* and in the 1440s Nicholas Upton in his *De Officio Militari* suggested that it was a general rule throughout Christendom that clergy and Church property must remain untouched, along with pilgrims, merchants and peasants.⁴³ Other categories of people to be spared were at times mentioned, such as fishermen, students, and fond fathers travelling to see their student-sons while the kings of the home country of father and son, and of the university respectively, were at war with each other.⁴⁴ This spread to protection of civilians in the lands of the adversary can be illustrated particularly with the successive ordinances issued by Charles the Bold, Duke of Burgundy in 1473 and 1476. While earlier Burgundian ordinances had posed no inhibitions concerning enemy civilians, these last two prohibited "pillage or theft in friendly lands, violation of a sanctuary in friendly or enemy lands; rape of women in friendly or enemy lands."⁴⁵

X.2.3. Ordinances with International Points of Reference: the Sixteenth and Seventeenth Centuries

In the Sixteenth Century, ordinances were sometimes printed in war manuals which otherwise were a genre of their own, going back to the famous Fourth-Century Roman manual of Vegetius (widely read throughout the Middle Ages). Many Renaissance authors were tasked to update ordinances and would do so in adding them as appendices to their own works on the art of

⁴¹ Martinez 2017, p 378. *Per contram*, see Cox 2013, p 1408 f.

⁴² See for example Anon 1540-1555, Fourquevaux 1548, Sutcliffe 1593, Schwendi 1593.

⁴³ Bovet c. 1382-87/2017, Book IV Chapter 100, p 470f. ; Upton 1447/1654, Book II Chapter 12, p 90.

⁴⁴ Bovet c. 1382-87/2017, Book IV Chapter 88, pp 438-442.

⁴⁵ Schnerb 1990, p 106.

war.⁴⁶ Occasionally, such a manual could serve in the way in which government publications would in the Twentieth and Twenty-first first Centuries: covering everything from basic strategic approaches to recruitment and rules of engagement (i.e. articles of war).⁴⁷ Generally, they would not only prescribe good practice in tactics and preparations for war, but also delve into the justifications for war, the *ius ad bellum*, running through the usual just and unjust causes recognised as such since Roman times. Their reasoning was hardly different from that of Onosander who in the First Century A.D. had stressed that a just cause would greatly enhance the morale of soldiers.⁴⁸ This was not cynical but a holistic, pre-Machiavellian view of the world, which did not differentiate between what is good and what is useful (even in and well beyond his own age, Machiavelli with his purely utilitarian reasoning was seen as exceptional).

In the sixteenth and seventeenth centuries, the spread of the norm of civilian protection to include enemy lands continued. The ordinances of Christian IV of Denmark, Gustavus II Adolphus and Charles XI of Sweden thus stipulated that that rape should be punished by the perpetrator's death not only in their kingdoms, but also in enemy country.⁴⁹ These were clearly the foundations of international humanitarian law applicable everywhere, and not just formulated to protect one's own subjects.

At the same time, there was still much variety in what was seen as acceptable behaviour and what was not. For example, in the much-cited ordinances of Emperor Maximilian I of 1508, the protection of pregnant women or women in childbed, of widows and honourable virgins, young girls and housewives was proclaimed as well as that of old folk and children of both sexes.⁵⁰ By contrast, the 1570 ordinance of Emperor Maximilian II only extended protection against rape to women in childbed, while the best that other women could hope for was that they would not be killed.⁵¹ An ordinance issued by Emperor Ferdinand III during the Thirty Years War extended protection to virgins, but apparently not to married women, unless they were pregnant or in childbed.⁵² Otherwise the articles forbade the destruction of mills and

⁴⁶ Vallo 1539; Anon 1540-1555; Fourquevaux 1548; Sutcliffe 1593; Schwendi 1593; Junghans von der Olßnitz 1595; and for a late work of the sort, see Ludovici 1733.

⁴⁷ Heuser 2017, chapters 4-6.

⁴⁸ Onosander before A.D. 57/159.

⁴⁹ Ordinance of Christian IV of Denmark, Article XXXIX (p 355). Ordinance of Gustavus II Adolphus of Sweden, Title V. Ordinance of Charles XI, Title XVI, Article LXXXVIII, all in Schultze 1692, pp 192, 355.

⁵⁰ „Des Blorwuerdigen [sic] Kaeyzers Maximilianen / deß Ersten dieses Namens/Kriegs-Artickel / wie solche verabfasset und fürgeschreiben im Jahr Christi 1508, auch aufgezeichnet von Goldast mit dem Zunamen von Haiminsfeld genant / zu Latein gefunden werden', Ordinances of Emperor Maximilian I of 1508, Article 14, printed in Schultze 1692, inconsistent pagination.

⁵¹ Ordinance of Emperor Maximilian II, Articles VIII, LIV, printed in Schultze 1692.

⁵² Printed in Schultze 1692.

(shared, public) ovens or the theft of ploughs and other agricultural tools, except when ordered by an officer as an act of war.⁵³ No exception was tolerable when it came to Church property, which was always declared untouchable, even, in the ordinances of the Thirty Years' War, when it belonged to those of another confession.⁵⁴ In late Seventeenth Century Europe, the following article in the ordinance of Christian V of Denmark reflected the generally accepted custom:

Upon pain of death are prohibited: lese-majesty, all deliberate homicide, murder, sexual conduct against nature, incest, bigamy, [...] kidnapping, forceful abduction, laying fire, street robbery, highway robbery, stealing church property [...].⁵⁵

It was still the case that such protection of civilian populations from all violence did not apply to besieged towns and fortresses if they were taken by force. Yet even there, soldiers were supposed to wait for their officers' permission to pillage, destroy and otherwise vent their anger on the local population.⁵⁶ If the commander or a prince pronounced any particular place to be under "*salva guardia*" [taboo], it was to be untouchable.⁵⁷

In early modern times, ordinances commonly began with a statement as to the total submission to the will of God and to His laws by the prince or general issuing them.⁵⁸ The Scandinavian ordinances contained some particularities: apparently it was customary in the northern countries to cast spells on weapons, a practice which Scandinavian ordinances tended to proscribe especially as heretical.⁵⁹ Other distinctions in local customs can be found in the marital status of soldiers and officers: while Louis XIV of France in his Ordinance of 1661 (Article XXII) decreed that no soldier was allowed to be married, Charles XI of Sweden's ordinance of roughly the same time forced unmarried military men to marry the women with whom they lived.⁶⁰

⁵³ For example the Ordinance of Maximilian II, Article LIII and his Ordinance for the Cavalry, Article LXIX. Ordinance of Gustavus II Adolphus of Sweden, Title XVII. Ordinance of Charles XI of Sweden, Title XVII, all printed in Schultze 1692. Schwendi 1593, p 159.

⁵⁴ See the Ordinance of Maximilian II, Article LXX and the Ordinance of Gustavus II Adolphus, Title XVIII, printed in Schultze 1692, inconsistent pagination.

⁵⁵ Text in Schultze 1692, inconsistent pagination.

⁵⁶ See, for example, Fronsperger 1571/1819, Volume I., Article XIII, p 42 f.

⁵⁷ See the Ordinances of Maximilian I, Maximilian II and Ferdinand III.

⁵⁸ For an example, see Devereux 1643, Article 1.

⁵⁹ Printed in Schultze 1692, inconsistent pagination.

⁶⁰ Printed in Schultze 1692, inconsistent pagination.

The majority of the ordinances issued in France under Louis XIV were of the type focusing on military discipline.⁶¹ Almost all the early modern ordinances still assumed that prisoners of war could be ransomed, and that pillage was an essential part of the economy of war (without which the soldiers would have had little stake in it). Many articles were generally devoted to the right to the partition of booty – which proportion would go to the State or the crown, which to the commanding officers, which to the soldiers, while about a tenth would be withheld for wounded or sick soldiers.

Ordinances continued to be read out aloud. The early Sixteenth Century ordinances of Henry VIII of England stipulated that they should be read out to the soldiers twice a week.⁶² Gustavus II Adolphus in his ordinance which dates from the Thirty Years' War noted that they should be read at least four times a year, even in times of peace.⁶³

X.2.4. Between Army Regulations and Laws of War : the Eighteenth and Nineteenth Centuries

Eighteenth and Nineteenth Century ordinances were largely continuing in the two types of ordinances mentioned above: population-centric norms of conduct, and army regulations (with an emphasis on discipline), most frequently a combination of both. They continued to denounce desertion, fights between soldiers of the same army, dereliction of duty, insubordination and other disciplinary problems. They continued also to forbid the burning of public buildings, of fruit trees and harvests, now usually not only in one's own lands but also in those of the enemy. They would also proscribe violence being used against innocents, burning their houses, theft and rape. All this can be found, for example, in the early Austro-Hungarian Empire's ordinances.⁶⁴ The resort to military force had become increasingly circumscribed.

Ordinances of this period differed from their predecessors in that they reduced or even eliminated pre-ambls referring to God and his will. They could reflect quite different values, from humanitarian to autocratic. On 4 May 1792, on the eve of its first military campaign, the French revolutionary National Assembly professed its faith in the nation instead:

⁶¹ Ordinance of Louis XIV of 12 October 1661, printed in Schultze 1692. Louis XIV 1681. Louis XIV 1689. Louis XV 1765.

⁶² Martinez 2017, p 382.

⁶³ Ordinance of Gustavus II Adolphus, probably dated from 1621, printed in Schultze 1692, p 212.

⁶⁴ See, for example, K.K. Landesregierung 1809, Articles XXV, XXVI, XXX, XXXI, ff, and Bergmayr 1835, with almost identical articles. Prussian Articles of War of 1852, in Kletke 1867, see Articles 24 and 25.

The National Assembly,

Wanting to regulate, at the beginning of the war undertaken in defence of liberty, according to the principles of justice and humanity, the treatment of enemy military whom the fate of combat would put into the hands of the French nation;

Considering that in the terms of the declaration of the rights [of man], if society is forced to deprive a man of his liberty, all unnecessary harshness to assure oneself of his person shall be severely punished by the Law;

Acknowledging that this principle applies particularly to prisoners of war who, not having signed up voluntarily to serve the civilian power of the Nation, should stay under the special protection of the natural law of men and nations;

Decrees that there is a state of emergency. [...]

All inappropriate harshness, insult, violence or murder committed against prisoners of war will be punished according to the same laws and the same punishments as though these excesses committed were committed against the French.⁶⁵

In the same spirit aiming to limit the effects of war on the working classes, the French revolutionary National Assembly and the Convention passed a series of laws in the tradition of the ordinances of war which created and then repeatedly reformed military tribunals, to make them more effective. On 27 July 1793, the Convention put the death penalty on pillaging, rape and those who deserted their post (during the Napoleonic Wars, the huge size of the armies made it impossible to keep them supplied without living off the land from much of the time. The problem was formally resolved by making requisitioning a legal and formalized practice, which did not make it any more popular in the occupied areas).⁶⁶

A very different authoritarian spirit inspired the Prussian ordinances of the time, and well into the Nineteenth Century. The Articles of War of the Prussian Army of 5 December 1852, for example, began not with a citizen's freedoms but with his obligations. Every citizen, they noted, was obliged to do military service. Almost every article in this collection pertained to the relations between the soldier and the military hierarchy, to discipline and above all to punishments for indiscipline.⁶⁷ Thus this Prussian ordinance stands fully in the discipline-centric tradition of the medieval Italian codices and the ordinances of the absolutist state of

⁶⁵ printed in and translated by Best 1980, p 78 ff.

⁶⁶ Bodinier 1997, pp 287 f, 324.

⁶⁷ Kletke 1867.

Louis XIV and not in the population-centric tradition we find from the ordinances of the Holy Roman Empire to the Lieber Code of 1863.

The originality of the Lieber Code lies in its insertions of reflections on the laws and purposes of war. Another innovative aspect is that it spells out reasons for the application or suspensions of regulations. Francis Lieber supposedly introduced the concept of “military necessity” as a reason for disregarding certain restrictions on the use of force.⁶⁸ This concept incidentally can probably be traced back to the French clergyman Honoré Bovet writing in the late Fourteenth Century and the Spanish jurist Luis de Molina writing in the 16th.⁶⁹ Lieber has thus acquired a reputation for being Machiavellian. In reality, Lieber, who had experienced the horrors of war as an adolescent and who lost a son to the American Civil War, mainly intended to create more restraints on warfare. One of his main concerns was the fate of soldiers as prisoners of war, and the suffering of soldiers who were fighting on the side of ‘rebels’, a category of combatants usually dismissed as irregulars and thus deprived of any protection; he aimed to win for them the same protections given to soldiers fighting for regular states.⁷⁰ Lieber deserves his reputation as great thinker who put together a body of articles of war with great clarity and a cartesian structure. But the 157 articles of his famous Code mostly have a long genealogy of antecedents which should not be forgotten.

X.3. Were the Ordinances Effective ?

If we follow the ICJ’s criteria, a law has to be applied by a court of law to be valid. The question of whether, how and to what extent ordinances served as the basis for trials and punishment merits much further research. All we can do in this sketch is to summarise some work that has already been done on a small sample of cases since the Thirteenth Century.

X.3.1. The Anglo-Scottish Wars and the Hundred Years’ War

One case study undertaken by Rory Cox is that of the application of the ordinance of Edward I of England concerning his 1296 campaign against the Scots. A total of 185 charges were made by subjects of Edward concerning breaches of the articles while the English host was marching

⁶⁸ Carnahan 1998.

⁶⁹ Domínguez Nafría 2002, p 539.

⁷⁰ Lieber 1863.

north through *English* lands. Several of the charges were commuted into charges of the breach of the King's Peace, rather than charges of war crimes. Either way, sentences were delivered and individual transgressors were executed.⁷¹

Turning to the Hundred Years' War, Maurice Keen in his detailed studies of the records of military tribunals found that, at least where charges brought before the courts by knights are concerned, "[m]ilitary tribunals claimed cognizance of the offences not only of soldiers of their own side, but of soldiers generally, even those of the enemy".⁷² Keen notes, however, that members of the lower strata of society were treated with indifference and even great brutality, with little evidence that these war crimes—as war crimes they were, when they were carried out against the injunctions of the ordinances—were brought to justice.⁷³

One of the areas where there was a lack of consensus among ordinances and customary law concerned the treatment of prisoners, if they could not be ransomed or posed a concrete threat while a battle was still being waged. Honoré Bovet, writing in the late Fourteenth Century thought that while in principle one should not kill a prisoner of war, what might later be called "military necessity" might make it imperative to do so.⁷⁴ Indeed, in 1415 during the battle of Agincourt, Henry V of England ordered the massacre of his prisoners of war when it was (wrongly) thought that reinforcements of his French adversary were about to arrive, and he feared that the prisoners would seize the opportunity to escape their outnumbered guardians and take up arms against them. Nevertheless, his Mantes Ordinance, issued subsequently, specified that killing prisoners of war was prohibited. Anne Curry, in her study of this and other edicts of the time in their historical context, notes that contemporaries thought Henry to have been very law-abiding: according to the chroniclers Jean de Waurin and Jean Le Fèvre, Henry's popularity in France was derived from his conscientious pursuit of justice and good governance in the regions under his control.⁷⁵ And two years after the Battle of Agincourt, John the Fearless of Burgundy on the eve of an expected battle near Paris ordered that 'no one, whatever his status, should be so bold as to take prisoners on the day of battle, until it is plainly obvious that the field has been won; and that, if any prisoner is taken' before the battle had been won, "he

⁷¹ Cox 2013, pp 1403-1405.

⁷² Keen 1965, p 47.

⁷³ Ibid., p 190 f.

⁷⁴ Bovet c. 1382-87/2017 Book IV Chapter 13, pp 238-240.

⁷⁵ "Et la principale cause si estoit par ce que ceulz qui faisoient le contraire et enfreignoient ses commandements ou ordonnances il faisoit pugnir tres criminelement sans quelque misericorde, et bien entretenoit la discipline de chevalerie comme jadis faisoient les Romains." Quoted in Curry 2008, p 238.

will be killed, and so will his captor if he refuses” that the prisoner he had taken be killed.⁷⁶ No prisoners before the battle was won meant quite literally, no mercy for anybody who sought to surrender. Thus, the argument of military necessity seems to have been widely accepted at the time.

Bertrand Schnerb in his research on the judiciary system in the armies of the dukes of Burgundy in the Fourteenth and fifth Fifteenth Centuries found that the rulers on both sides during the Hundred Years’ War tended to acquit their knights if they were accused of misdeeds; he speculates that the respective princes needed the knights too much to be able to incur their wrath by punishing them. Only after the Treaty of Arras of 1435 did the Duke of Burgundy apply his own ordinances more systematically. Schnerb cites at least two cases where soldiers were hung for rape which indicates that not only the complaints of knights and issues of the division of spoils were dealt with by the Burgundian military courts.⁷⁷ The administration of justice on the basis of existing ordinances might have been patchy, but there is evidence of such application.

X.3.2. The Anglo-Spanish War (1585-1604)

A century later, the Anglo-Spanish War furnishes an interesting example of a scrupulous application of an ordinance. The second Earl of Essex, commander-in-chief of Queen Elizabeth I’s army, in the campaign of 1596 against Cádiz applied the laws of war which Matthew Sutcliffe had compiled in his official publication on war. Even before setting out for Spain, Essex had some soldiers hung for misdeeds committed while still in England.⁷⁸ Later, under his command, Anglo-Dutch forces seized and pillaged Cádiz, which for many of them (and also for Queen Elizabeth and Essex himself) was at least one of the two principal aims of this campaign. But this was not at odds with Sutcliffe’s ordinance. The Spanish monk Pedro de Abreu, an eye witness to these events, noted that Essex’s soldiers

despoiled the houses of anything they could find, taking the objects they had seized to the ships; they broke down the walls, roofs and storage spaces where they suspected that money or other goods were hidden; they [...] drained wells and gutters and cess pits to look for silver, gold or

⁷⁶ Ambühl 2013, p 104 f.

⁷⁷ Schnerb 1990, pp 100 f, 107 f.

⁷⁸ Sutcliffe 1593.

other money [...]. They undressed women to see if they were hiding objects [under their clothes], and if their clothes were precious [...] they left them standing in their undergarments or even naked. And they did the same to the me [...].⁷⁹

Moreover, the Dutch and English soldiers, deeply hostile to Catholicism, sacked the churches of Cádiz, destroying paintings and statues of saints. Famously, one damaged statue of the Virgin with the child was rescued by the Spanish from the cathedral in Cádiz and transferred to Valladolid, which at the time was Spain's capital city, where it is worshipped until this day.⁸⁰ Nevertheless, it seems that the expeditionary corps did not rape or massacre civilians.⁸¹ A witness reported that the women were allowed to leave the city, escorted by gallant Englishmen so they would not be molested on the way.⁸² King Philip II of Spain himself is supposed to have admitted that "such nobility was never seen among heretics."⁸³

Historian Geoffrey Parker claims that "in most of the wars waged in Europe since the Sixteenth Century, breaches of the norms for military conduct laid down in treatises [...] have been condemned and chastised" with individual soldiers facing "trial and punishment by special military tribunals committed against either fellow soldiers or civilians."⁸⁴ He documents atrocities committed by the infamous Duke of Alba in his counter-insurgency campaigns against the Dutch insurgents (in 1573, for example, Alba had all Dutch prisoners hanged) and the ensuing judicial enquiry ordered in 1574 by Philip II about Alba's conduct (Alba was acquitted but several of his commanders were banished from court; it seems to have been more the fear of reciprocity in acts of cruelty committed by the Dutch against Spanish soldiers and officers that stopped Alba's hangings, rather than fear of his king's displeasure or any court martial). Again, in 1576, after Alba's forces sacked Antwerp leaving 8000 citizens dead and 1000 houses destroyed, Philip ordered a judicial enquiry.⁸⁵

The English gallantry displayed at Cádiz differed markedly from the way English armies behaved in Ireland at the time (in the late Sixteenth Century). As the Irish were considered

⁷⁹ Quoted by Cruz 2008, p 43f.

⁸⁰ Cruz 2008.

⁸¹ Hammer 1999, p 229f.

⁸² Hammer 1997, p 197

⁸³ Cruz 2008, pp 43, 48-60.

⁸⁴ Parker 2002, p 159 f.

⁸⁵ Ibid., p 164.

rebels, a category of adversaries who until Francis Lieber's times were treated as criminals, the limitations on the use of force contained in ordinances applied elsewhere were suspended.

X.3.3. The English Civil War (1642-1651)

While the English Civil War also began as a rebellion against royal authority, the two sides soon treated each other with relative respect, as Barbara Donagan found in her studies; indeed, it seems there were few differences between the ordinances issued by both sides. By contrast, the application of the ordinances was inconsistent on both sides.⁸⁶ For example at the battle of Lostwithiel, King Charles I, and at the battle of Reading, the third Earl of Essex (son of Elizabeth's army chief) tried in vain to prevent pillaging. Local civilians at times joined the victors to despoil and harass the defeated soldiers. The commanders of victorious armies often found it difficult to discipline their soldiers and to prevent robbery, rape and killing of civilians suspected of having supported the enemy army. Discipline was difficult to maintain 'so long as plunder retained its central place in an army's system of reward and incentive, and methods of coercion were rudimentary'.⁸⁷ Atrocities committed in the English Civil War were horrible, but relatively much smaller in number than those experienced by the Central Europeans during the contemporary Thirty Years' War which cost the lives of a third of the populations of the lands concerned.

What happened in Ireland in the meantime was more akin in scale to the horrors that took place on the Continent. As in the previous century, the victims of atrocities committed by Cromwell's New Model Army in Ireland were of comparable numbers relative to the whole population to the war-caused deaths on the Continent during a comparable time span of the Thirty Years War. Throughout Europe, the customary law that citizens of towns that had been taken by force could be put to the sword or otherwise maltreated that can be traced back, without interruption, to Antiquity had as consequence that such massacres were not in fact contrary to the articles of war.⁸⁸

Overall, for England at least, Donagan has found archives of military tribunals that are proof that the "laws and ordinances of war" were applied. She found that the military tribunals passed

⁸⁶ For the Parliament side, see Devereux 1643.

⁸⁷ Donagan 1988, p 92.

⁸⁸ Clifton 1999, pp 107-126.

judgement relatively quickly, but that there was some slackness in the execution of the sentence which varied from court to court.⁸⁹ Two years after the restoration of the Stuart monarchy, a court of claims was established to hear charges of war crimes brought also against the conduct of the Cromwellian forces in Ireland.⁹⁰ But this was not enough to put the traumas of the Cromwellian atrocities to rest.

X.3.4. Other Evidence of Application

For wars on the European Continent in the Sixteenth Century, Lienhart (Leonhard) Fronsperger (1520-1575) has left us detailed descriptions on the composition of military tribunals, the examination of evidence in complaints made against the German *landsknechte*, the interrogation of witnesses and the judgements.⁹¹ The ordinances of Gustavus II Adolphus and Christian XI of Sweden (the latter dating from 1683), Louis XIV (1665) and Christian V of Denmark (1683) all detail the structures and procedures of military tribunals.⁹² One might surmise from this that, as the tribunals were set up, the ordinances were applied, at least selectively. Nevertheless, the Thirty Years' War and the campaigns of Louis XIV were known for their excesses especially with regard to the civilian populations.

Other examples of the application of articles of war can be gleaned from a cursory reading of literature on war. In keeping with the noble ideals of the French Revolution that we have illustrated above, in 1792, General Dumouriez in Jemappes and General Custine in Speier prevented the sack of these two towns by French forces. Custine even had soldiers hung for merely inciting their comrades to set pillage.⁹³

Undeniably, ordinances were on the whole not sufficient to prevent all massacres and other atrocities throughout the millennium since the promulgation of the first ordinance we have identified. Yet we cannot claim that the world has seen fewer horrors in absolute numbers since the creation of multilaterally agreed conventions on the laws of war in the second half of the Nineteenth Century.

⁸⁹ Donagan 1988, p 86 f.

⁹⁰ Parker 2002, p 160.

⁹¹ Fronsperger 1571/1819, Volume I., pp 1-38

⁹² Ordinance of Gustavus II Adolphus in Schultze 1692, pp 214-221. Ordinance of Louis XIV, Articles XLIII-XLVIII in Schultze 1692. Ordinance of Charles XI of 1683 in Schultze 1692, p 273 ff. Ordinance of Christian IV of Denmark of 1683 in Schultze 1692, p 424 f.

⁹³ Best 1980, p 78 ff.

X.4. Ius Publicum Europaeum?

In comparing the Franco-Scottish and English ordinances of the Hundred Years' War, Anne Curry has noted many similarities in content, logic and format, while local particularities continued to exist (for example, the death penalty and punishment in the form of amputation was imposed on archers more frequently in Scotland than elsewhere). Nor was there much change over time in the contents of English ordinances until that of Henry VIII in 1513.⁹⁴ Looking also at contemporary ordinances put forward elsewhere in Europe, Anne Curry judges that one can speak of a European “international code2.”⁹⁵

Thus customary law was establishing itself in matters of *ius in bello* in the late Middle Ages. Andrew Martinez has documented this for the evolution of English ordinances from 1385 to 1513.⁹⁶ In the Sixteenth and the Seventeenth Centuries, ordinances were clearly formulated with explicit cross-references to earlier judicial documents. We can see this in the ordinances of the Holy Roman Empire promulgated by Emperor Maximilian I in 1508 and Ferdinand III, published in 1637 and 1657.⁹⁷

Local differences definitely persisted. One person who knew about both was Philip Duke of Cleves and Lord of Ravenstein (1459-1528) who had served in the armies of the Holy Roman Empire as well as of France. When an anonymous editor published Cleves' book on war posthumously in 1559, he noted that there were a German and a “*welsch*” (French) way of war, although this referred more to tactics than to restraints on warfare.⁹⁸ Yet, basic elements of the ordinances of war were consciously copied from one State to another. Thus the “*Articuls-Brief*” of the Dutch Estates-General, adopted at Arnhem in 1590, clearly served as the model for the ordinance drawn up for Christian IV of Denmark (reigned 1588-1648), and for that of his grandson Christian V of 1683, and for those of 1621 and 1683 drawn up for the Swedish kings Gustavus Adolphus and Charles XI. When he became King of England and Scotland, William III of Orange had the Arnhem ordinance applied to the wars on the British Isles.⁹⁹ In turn, we see references to Gustavus Adolphus' ordinance in the Imperial Ordinance of 1674,

⁹⁴ Curry 2008.

⁹⁵ Curry 2011.

⁹⁶ Martinez 2017

⁹⁷ All printed in in Schultze 1692, inconsistent pagination.

⁹⁸ Ravenstein 1559, , preface

⁹⁹ All printed in in Schultze 1692, inconsistent pagination.

which may be due to the work of Georg Simon Marsteller who had, for six years, previously been secretary to the Swedish king.

The Arnhem ordinance is also remarkable as it was drawn up collectively by a number of jurists, and it was accompanied by a commentary that not only referred to the great philosophers of Antiquity to justify individual articles, but also to Sixteenth Century ordinances of other countries. It thus directly contributed to the construction of a European law of war. The Arnhem ordinance was defined as part of a more general legislation designed to stabilise both society and state, as is underscored by a Spanish poem, *La Araucana* by Alonso de Ercilla, printed in the ordinance's commentary: "El premio y el castigo la tiempo usados / sustentan las republicas y estados" [Rewards and punishment in good time / sustain commonwealths and estates].¹⁰⁰

A century later, the ordinance issued by Christian Albrecht Duke of Schleswig in 1674 also cites long passages from earlier ordinances, but also refers to legislation applicable to times of peace, especially the legislation of Emperor Charles V which was still in force. The duke noted that the members of his Council had agreed that the articles of his ordinance were "in accordance and conformity [*gemäß und conform*] with the laws of war and other laws, and the constitutions of States and conventions everywhere [*überall*]" in Europe.¹⁰¹ Writing in 1733, the jurist Jacob Friedrich Ludovici went one step further in not only listing ordinances and other legal documents he had read, but also other experts on the laws of war whom he had consulted. These were mainly subjects of the Holy Roman Empire, but also a Swedish and a Dutch expert.¹⁰²

X.5. Conclusion

We have found that the ordinances identified were applied by tribunals, at least in some contexts and in some wars. We have also demonstrated that ordinances were customary law, internationally recognised, referring to precedent and to the *opinio iuris* of lawyers who were experts on the subject. In this sense, the ordinances of war not only constituted the *ius in bello* of one or several countries, but *ius publicum europaeum*, European public international law, and were seen as customary throughout European Christendom. This long history and tradition of the European *ius in bello* should be more generally recognised.

¹⁰⁰ Ibid., inconsistent pagination.

¹⁰¹ Ibid., Preface, p 1.

¹⁰² Ludovici 1733, Preface.

The history of ordinances is also a reflection on the slow transformation of a concern to protect exclusively one's *own* population, and then select populations in contested lands in return for their surrender, to, eventually, a concern for civilians of all nationalities, against the ravages of war, in what is now called International Humanitarian Law. This earlier differentiation made between one's own populations and civilians elsewhere would continue to be present, however, long after the Lieber Code was succeeded by the first multilateral, international treaties designed to protect civilian populations. These were cast aside, time and again, even by states keen to uphold international law, if military necessity could be pleaded or if new weapons technologies (especially aerial bombardment) seemed to offer the prospect of a quick victory. The humanist recognition of the equality of humanity is fragile to this day.

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